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# The General Agreement on Trade in Services and Canadian Federalism How Inter-Governmental Relations Exacerbate the Threat to Public Education

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## Abstract

The General Agreement on Trade in Services (GATS) has been commonly acknowledged to have the potential to negatively affect the provision of public education. However, there has been an absence of literature analyzing the way in which Canadian federalism and the division of powers coupled with the GATS could serve to exacerbate the threat to public education at the primary and secondary school level. This paper begins by outlining the GATS provisions of non-discrimination, domestic regulation, and market access, and subsequently shows how the introduction of these provisions, should governments 'opt-in' on education, could serve to threaten public education, which has been identified by the United Nations as a basic human right. The final sections of this paper examine how the threat to public education posed by the GATS is exacerbated by intergovernmental relations, particularly regarding the consultative mechanism by which provinces' policy preferences are conveyed during the negotiation of international trade agreements. While this mechanism allows provinces to apply GATS provisions to education to different extents, it can also serve to increase the pressure on governments to liberalize education by encouraging competition between provinces for revenue from private educational institutions.

The General Agreement on Trade in Services (GATS) was created to emphasize direct economic objectives, namely profit, as the guiding principle behind the exchange of services. Services covered by the agreement become commodified, or produced for the sole purpose of sale on the market, and little room is left for conceptualization of exchange governed by other objectives. This is particularly problematic for services, such as education, which are covered by the GATS, but are often provided to achieve a collective societal good without a direct profit motive.<sup>1</sup> In order to liberalize trade in an area such as educational services under the GATS, a shift in perception is required from education provided as a collective societal good to a privately owned commodity. This paper will explore the implications of liberalizing trade in educational services, given the necessity of this perception shift for Canada. An initial discussion of the general provisions contained within the GATS will yield to an examination of the practical problems that exist in applying such provisions to education, which include ensuring that education remains a basic human right as guaranteed by the United Nations (UN). The scope of the paper will be limited to the provision of education services at the primary and secondary level and will exclude

considerations of labour external to teaching staff, as this falls outside the classification of education adopted by the GATS.<sup>2</sup>

While much literature has explored the nature and implications of the GATS for the provision of education services, the practical difficulties of negotiating and implementing commitments on the liberalization of education services given Canada's federal structure have been largely ignored. These challenges stem from the fact that the federal government has the jurisdiction to negotiate international trade agreements, but that education is a provincial responsibility. For reasons of international pressure and issue linkage, it appears as though the federal government is the primary actor driving this agenda; because education is essential for the transmission of values and culture, it is likely that some provinces might resist the shift in perception from education as promoting a collective societal good to a commodity that is necessary if education services are to be liberalized. The last two sections of this paper will explore these tensions and the mechanisms at each government's disposal to achieve their policy preferences. As will be seen, the structure and dynamics of Canadian federalism only serve to heighten and reinforce the aforementioned shift in perception from education as a collective societal good provided without an explicit profit motive, towards a commodity that can and should be governed by the rules of the market as promoted by the GATS.

### I: The General Agreement on Trade in Services

Ratified in 1995 as part of the World Trade Organization (WTO) Uruguay Round Agreement, the GATS formally expanded the definition of trade encompassed under the multilateral trade regime to include services.<sup>3</sup> The provision of services underpins most societal activity, ranging from

‘birth (midwifery) to death (burial); the trivial (shoe-shining) to the critical (heart surgery); the personal (hair-cutting) to the social (primary education); low-tech (household help) to high-tech (satellite communications); and from wants (retail sales of toys) to...needs (water distribution).’<sup>4</sup>

When commodified and performed for a wage, services such as these account for 70 percent or more of the economic activity in developed countries.<sup>5</sup>

Services are intangible, difficult to monitor, tax and measure. Furthermore, services are usually highly heterogeneous. They are often tailored to the needs of the customer and thus vary greatly in what is or can be supplied across international borders.<sup>6</sup> Finally, because services are

typically produced and consumed at the same time, “often with the customers participating in the production process,” applying rules and principles of trade in goods to trade in services is highly problematic.<sup>7</sup> Because of the nature of services, the GATS identifies and targets modes of supply. Modes of supply include cross-border supply, which involves the service provider moving across borders; commercial presence, which involves all foreign direct investment in service providers; and presence of natural persons, which involves labour mobility in the provision of services.<sup>8</sup> By targeting these modes of supply, the GATS is able to promote stricter applications of the foundational principles of the agreement and trade regime more generally, which include most-favoured-nation (MFN), domestic regulation, national treatment (NT) and market access rules.

MFN and NT are fundamental principles embodied in the General Agreement on Tariffs and Trade (GATT), and help reduce barriers to trade, specific to mode of supply, at the border. MFN, which states “each Member shall accord immediately and unconditionally to services and service providers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country,”<sup>9</sup> applies to all disciplines irrespective of whether explicit commitments have been made in the area. Thus, any commitment of liberalization that is made in the future must be extended to all countries. No immediate provision is made to protect advantages extended to countries within regional or preferential trade areas, except along “contiguous frontier zones of services that are both locally produced and consumed.” This suggests the potential for multilateralizing such commitments, which would facilitate continued liberalization.<sup>10</sup> NT, which is an internal practice to prevent discrimination between foreign and domestic providers, requires WTO members “to accord to services and service suppliers of any other Member...treatment no less favourable than that it accords to its own like services and service suppliers.”<sup>11</sup> Because NT is included under Part III, the Specific Commitments section of the GATS, sector-specific conditions and qualifications can be placed on its application. This is also true of market access.

In sectors where market-access commitments are undertaken, countries must not enact limitations on the number of service suppliers, limitations on the total value of transactions, limitations on the total number of service operations or on the total quantity of service output, limitations on the number of natural persons employed in a particular service sector, measures which restrict or require specific types of legal entity or joint venture, or limitations on the

participation of foreign capital or investment.<sup>12</sup> The domestic regulation principle also affects investment. In sectors where specific commitments have been undertaken, governments have a responsibility to ensure that “all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”<sup>13</sup> This entails that

measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services...such disciplines shall aim to ensure that such requirements are, *inter alia*: a) based on objective and transparent criteria, such as competence and the ability to supply the service; b) not more burdensome than necessary to ensure the quality of the service; c) in the case of licensing procedures, not in themselves a restriction on the supply of a service.<sup>14</sup>

This provision exists to ensure that potential government interference affecting the efficient functioning of the market and allocation of resources by it will be minimized.

The identification of modes of supply in the GATS and the foundational principles of the agreement restrict the ability of governments to interfere with the market in the provision and exchange of goods and services. As a result of the privileging of the market as the primary mechanism for determining the provision of services under the GATS, a perception of services as possessing merely an economic objective, the provision of which occurs for the primary purpose of securing profit, is supported. Thus, the commodification of services is encouraged to the detriment of conceptualizations which see the provision of services as filling an alternative objective.

There is one provision contained in the GATS which attempts to address alternative conceptualizations for the provision of services, however. A governmental authority exclusion was included in the agreement to exempt from the rules and principles of the GATS specifically “services supplied in the exercise of governmental authority.”<sup>15</sup> Services supplied in the exercise of governmental authority refers to “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”<sup>16</sup> This clause was likely included to placate the fears of many national governments regarding the breadth and scope of services included under this agreement; however, its effectiveness has never been tested through legal action. The possible limitations of this clause will be explored subsequently to ascertain the implications of applying the GATS to educational services.

The prescribed structure of GATS negotiations creates a two-tier system of commitment. National governments decide through the negotiation process to which areas they will ‘opt-in’

and make commitments. Once a commitment is made, the opportunity to create a schedule of exceptions exists. These exemptions may include terms, limitation and conditions on market access, conditions and qualifications on NT, undertakings related to additional commitments, and where appropriate, the time frame for implementation of such commitments.<sup>17</sup> In Canada, sub-national units have been given the ability to specify the extent to which commitments will apply in areas affecting their jurisdiction.<sup>18</sup>

However, built into the GATS is a requirement of progressive liberalization: “in pursuance of the objectives of the Agreement, Members shall enter into successive rounds of negotiations...with a view to achieving a progressively higher level of liberalization.”<sup>19</sup> The justification for this clause is to promote “the interests of all participants on a mutually advantageous basis and to [secure] an overall balance of rights and obligations.”<sup>20</sup> Effectively, this aims to ensure that concessions given by one country in one round of negotiation will be reciprocated in subsequent rounds, thus continually pushing forward the liberalization agenda. As such, the exemption schedules presented by national and sub-national governments serve as the starting point for future negotiations, in attempts to liberalize areas that had previously been protected.<sup>21</sup>

## II: The Nature of Services and Objectives Behind Provision

While much literature that focuses solely on the economic dimension of services trade has ignored the purpose and objectives behind the delivery of services, it is clear that certain services are performed for society with little or no profit motive guiding their supply. This may be because such services contribute to the aggregate well-being of society and are provided to achieve a collective societal good.<sup>22</sup> One way of achieving this collective societal good is by providing such services as public goods, administered through the public sector.<sup>23</sup> Public goods are defined as being non-rival and non-excludable, meaning that one’s use does not detract from another’s enjoyment of the good, and that the ability to enjoy a public good belongs to everyone in society.<sup>24</sup> One of the first writers on capitalism and the market, Adam Smith, spoke of public goods in the context of being provided where the market would not effectively provide important societal functions; this is the purpose of government for Smith.<sup>25</sup> Numerous scholars since have noted, where objectives behind the provision of service pertain to equity goals and individual rights, these services are best provided by public institutions sustained by governments.<sup>26</sup>

Education is one such service that is important for the aggregate well-being of society and serves “intersecting developmental, distributional, economic, and social functions” that promote the collective good of society.<sup>27</sup> In recognition of the importance of education, it has been guaranteed as a fundamental human right under the United Nations Declaration of Human Rights. Article 26.1 of the Declaration states: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.”<sup>28</sup> Furthermore, secondary education is mandated to be “made generally available and accessible to all by every appropriate means, and in particular by progressive introduction of free education.”<sup>29</sup> Availability in sufficient quantity of educational programs, accessibility without discrimination, within physical and economic reach, acceptability in form and substance of curriculum, and adaptability to the changing needs of society and students should generally characterize all education according to the UN Committee on Economic, Social and Cultural Rights in 1999.<sup>30</sup>

Thus, it becomes clear that in order to fulfill these international conditions on what norms should surround the provision of education worldwide, governments have a responsibility to ensure that education is provided as non-rival and non-excludable at the elementary and hopefully secondary level, and thus as a public good. While it can be argued that the market could provide education profitably, it will be shown the greater the private provision of education in Canada, the greater the difficulty Canadian governments will have in ensuring that education remains provided as a public good. Not being able to provide education as a public good will threaten Canada’s ability to uphold the standards of education as a basic human right as guaranteed under the UN Human Rights Declaration and achieve a collective societal good through its provision.

### III: Education as Defined Under the GATS

The perception of education as achieving a collective societal good clearly takes a backseat to the perception of education as a profitable commodity if one considers how education is included in the GATS. In fact, no specific definition of education exists under the GATS. As a result,

most WTO Members have scheduled their specific commitments for particular services with reference to the Services Sectoral Classification List developed during the Uruguay Round of negotiations which is based on and refers to the categories in the United Nations Provisional Central Product Classification.<sup>31</sup>

Definitions for educational services appear alongside definitions for other goods, products, and commodities. Furthermore, in addition to higher education, adult education and other educational services, the classification list encapsulates primary and secondary education. Because each of these levels of education is referred to in the classification list, each could potentially be subject to inclusion and negotiation in subsequent GATS rounds. As such, the potential for educational services at each of these levels to be viewed solely as commodities by their inclusion in the GATS is heightened and the ability of governments to protect education as a basic human right under the UN Human Rights Declaration and to provide it as a public good could be diminished.

#### IV: Threats to Public Provision and Maintaining Education as a Public Good

Maintaining education as a public good will help governments ensure education as a basic human right. Free (at least at the primary level) and equal access to education necessitates that the provision of education be non-excludable and non-rival. The ability of governments to maintain education as such is threatened by provisions contained in the GATS, which limit the effectiveness of treasure-based and authority-based policy instruments at the government's disposal. These policy instruments are essential in ensuring that education remains a public good, the maintenance of which is secured most confidently through a strong system of public provision.

Firstly, the application of the NT principle would limit treasure-based policy instruments, which include any type of funding or monetary incentive used by government to achieve its policy goals,<sup>32</sup> by mandating that any funding provided by government to a domestic producer, also be provided to all foreign producers.<sup>33</sup> Although most foreign producers would be private, and thus only eligible for the funding made available to private institutions, it remains to be seen whether the governmental exclusion clause would actually allow Canadian public schools to be exempt from GATS requirements. As will be discussed subsequently, if the governmental exclusion clause were not found to apply to Canadian public schools, this would require that private providers of education for profit get the same funding as public education providers. Although those at the WTO would not likely acknowledge it, this would amount to a *de facto* subsidy for private education providers, as they would still charge fees for their services, in addition to obtaining equivalent resources to publicly funded education institutions.<sup>34</sup> The result of this *de facto* subsidy would be lower operating costs for private institutions. This would



potentially allow private producers to offer more lucrative wages and benefits to teachers, luring them away from the public system. This could result in a shortage of teachers, which could mean school closures in more remote locations, reducing equality of access. Ultimately, education would become excludable and cease to be provided as a public good, undermining the ability of education provision to achieve a collective societal good by ensuring that all in society receive relatively equal and adequate education.

Exacerbating the threat NT poses to education is its ability to constrain a second type of policy instrument: authority-based instruments. Authority-based instruments involve the ability of governments to make regulations, laws and set standards.<sup>35</sup> Should governments desire to enact regulations to correct any imbalances in equality of access to education created by NT requirements as discussed above, they would be unable to do so unless such regulation did not result in less favourable conditions of competition for foreign producers.<sup>36</sup> This requirement severely constricts the options available to governments, as most regulation in attempting to correct imbalances created by liberalization, would likely require some distortion of the market mechanism to ensure that free and equal access to education could be maintained.

The application of the market access principle also has the potential to threaten free and equal access to education as a basic human right. Because it removes the ability of governments to limit the number of producers in a market, the market access principle threatens the potency of treasure-based instruments by spreading government spending over a larger number of entities. Thus, government resources intended to compensate for what private providers refused to supply would be increasingly ineffectual. This is significant because while free and equal access might exist *de jure*, the nature and quality of the access to free education would differ substantially, creating *de facto* inequalities in educational services.<sup>37</sup> In this situation, it would be true that education would become rival, with one individual's use of a private provider detracting from another's ability to effectively obtain the same service from a public provider. As education resources would have to be spread over an increasing number of service providers, governments' ability to control the quality of education through the use of treasure-based instruments would be reduced. Additionally, authority-based instruments would also be constricted by the market access principle. This is because the ability of government to regulate the number of educational institutions in a given place would be prohibited and relegated to the market. So while resources

would be spread increasingly thinly, governments would have no ability to control specifically how they were delegated and for what purposes.

The most significant constraint on authority-based instruments and their ability to ensure that free and equal access to education is achieved, however, is domestic regulation.<sup>38</sup> This rule removes the ability of governments to shape the nature and quality of education through legislation that is not in accordance with the principles and spirit of the GATS, which privileges the market mechanism in determining supply and demand of such services. Governments' ability to shape the provision of education to achieve a collective good within their society is therefore restricted when liberalization commitments have been made. Where NT and market access fail to ensure that the market determines the provision of education, the domestic regulation clause of the GATS requires governments to show regulations "were 'necessary' to achieve a legitimate objective, and that no alternative measure was available that was less commercially restrictive."<sup>39</sup>

While some feel reassured in the governments' ability to make policy and protect the public provision of education given the existence of the governmental authority exclusion, the protective value of this clause remains to be seen. This clause has not yet been challenged by the WTO dispute settlement mechanism.<sup>40</sup> Until a dispute settlement panel interprets this clause in response to a conflict between countries, the extent to which it can be substantively used to protect certain public services is unknown. However, considering that the purpose of the GATS is to promote the regulation of services trade through the unhindered market mechanism in the same way as other commodities governed by the WTO are traded, it is likely that this exclusion will be applied narrowly.<sup>41</sup> It is not the desire, nor the mandate of the global trade regime to protect governments' ability to promote collective societal well-being where such objectives interfere with the efficient functioning of the market. Thus, it is likely that dispute settlement panels will seek to interpret the governmental exclusion clause to enhance the free flow of services between countries and minimize exceptions allowing for government interference.

Furthermore, the governmental authority exclusion clause is defined to apply only to services provided exclusively by the state neither on a commercial, nor competitive basis.<sup>42</sup> This can be interpreted as including only services that a government can demonstrate are provided exclusively by the state, without charge to its citizens, as well as services that are provided without an identical competitor.<sup>43</sup> In public education, however, Canadians annually pay about \$400 per student in direct payments at the primary and secondary level beyond tax contributions.

While this varies by province, “nationally, private contributions amount to 6% of total spending on elementary and secondary education,” which does not include occasional informal fees and fundraising at public schools.<sup>44</sup> Thus, claims of exclusive government provision are undermined.

Moreover, if it is not deemed that public education in Canada is supplied without charge to its citizens, it is unlikely that it will be deemed to be without identical competitors, as funding is one of the most substantial differences between public education and private secular education. In most Canadian provinces, including British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec, a certain level of public funding is allocated to private schools.<sup>45</sup> In addition to the private funding that Canadians give to public primary and secondary schools, this public funding further reduces the distinction between education providers and increases the likelihood that public education services would be seen as being supplied in competition with other private service suppliers. From these examples, it is clear that there are ambiguities surrounding the language of the governmental authority exclusion clause, which private providers with a desire to gain access to foreign markets may challenge in order to limit governments’ ability to enact what will be seen, if viewed in strictly economic terms, as discriminatory practices.

#### V; GATS and Education: Who is pushing the agenda?

Although no formal commitments have yet been made by Canada in education, several OECD countries have put forward proposals for commitments to be made in future negotiations. At the inception of the GATS, Australia was one of the first to make commitments on liberalizing education services trade.<sup>46</sup> It has committed all modes of supply at both the secondary and higher education levels, with no exemptions on market access or qualifications on NT. The commitments made cover general as well as technical and vocational education at the secondary level in private institutions, and provision of private tertiary education services including university at the higher education level.<sup>47</sup> Primary education was the only category of education excluded.<sup>48</sup>

In October 2001, the Australian government produced a proposal to encourage other countries to follow in its path. The proposal identified significant impediments it perceived to the liberalization of education services involving all modes of supply. In particular, the proposal targeted the erection of barriers by governments in response to the growing use of the internet for delivering education services, as well as restrictions on the use and import of educational

materials.<sup>49</sup> These represent two areas where governments have likely tried to retain authority over what is taught and the values which are transmitted through education. By targeting these areas, it is clear that the Australian government desires to see education increasingly as a commodity as opposed to having a separate societal function. The Australian proposal prescribes that all Members should consider entering commitments on education services similar to those Australia has already made and states, “this particularly applies to those Members who have previously failed to enter any commitments in relation to education services,” such as Canada.<sup>50</sup>

While Australia was one of the earliest supporters of the liberalization of education services, the United States (US) has been more cautious in its liberalization of education services. In 1999 it had only committed higher education and some ‘other education’ services.<sup>51</sup> In 2000, however, it produced a proposal stating that it was willing to liberalize higher education, training services in particular, as well as educational testing services at all levels.<sup>52</sup> While the liberalization of education at these levels is outside the scope of consideration of this paper, liberalization commitments tend to have spillover effects, especially facilitated by the progressive liberalization clause in the GATS. This proposal by the US urges WTO Members that have not yet made commitments in education to do so and further proposes “that all Members consider undertaking additional commitments relating to regulation of this sector.”<sup>53</sup> Thus, as liberalization is achieved in higher and adult education, it is likely that attention will become focused on the secondary and subsequently primary levels of education. Attention will also increasingly be focused on countries which have not made any commitments.

As is evident from these proposals, there is mounting pressure on Canada to make commitments to liberalize trade in educational services. This pressure has been felt most strongly by the federal government. Although the federal government does not have jurisdiction over education, it has the responsibility in Canada for negotiating international trade agreements, such as the GATS.<sup>54</sup> Thus, it is interacting and negotiating with other countries on a regular basis in numerous areas and on numerous issues. As such, issue linkage becomes a significant factor in influencing the government’s actions and decisions.<sup>55</sup> Canada may seek to gain concessions on liberalization in other areas of trade as well as in other aspects of services trade. As a net exporting country, Canada benefits economically from gaining unrestricted, non-discriminate access to foreign markets for its products.<sup>56</sup> As such, in order to gain access to other markets, there are certain issues that Canada must concede to liberalize in order to gain concessions from

others. Given the momentum which can be seen in the proposals recounted above, it seems probable that education services may become a key area targeted through issue linkage. The likelihood of this will increase substantially as more OECD countries agree to liberalize trade in educational services. It will also increase as specific exemptions are actively targeted through negotiations resulting from progressive liberalization.

Furthermore, there are powerful Canadian business interests that would be glad to see educational services liberalized by Canada in order to gain concessions from others in the same area. While the federal government desires to protect public education, it has stated that “there has never been a better time for Canadians...to export education and training products and services.”<sup>57</sup> According to the Department of Foreign Affairs and International Trade, Canada is a world leader in e-learning, multimedia, interactive and web-enabled learning; special resources are provided by the government to businesses engaged in the ‘knowledge industry,’ looking to export Canadian educational products and services abroad.<sup>58</sup> The implication of this export promotion, however, is that in order for Canadian education service providers to gain access to foreign education service markets, it may be necessary to give access to Canada’s education service markets. Jim Greishaber-Otto and Matthew Sanger have found that the ratio of domestic exports to gross domestic product for education was only 1.4% in 2001, which they believe the federal government desires strongly to improve. Knowledge-industries are industries in which other developed countries are beginning to carve out competitive advantages, which Canada also feels it could possess. As such, Grieshaber-Otto and Sanger believe that export development is the dominating priority of Canada’s position on education.<sup>59</sup>

## VI: The Role of the Provinces

Regarding international treaties, the provinces are charged with the responsibility of implementing the agreements negotiated by the federal government in so far as they affect provincial jurisdiction.<sup>60</sup> However, education is the sole jurisdiction of the provinces as specified in section 93 of The Constitution Act 1867.<sup>61</sup> Education was made a provincial responsibility to bring Confederation to fruition. New Brunswick, Nova Scotia, Canada West and particularly Canada East demanded that their ability to protect their distinct cultures remain intact.<sup>62</sup> Education was seen as a primary entity through which culture could be promoted; it remains an important mechanism through which individuals are socialized into understanding the norms of

society and are prepared for citizenship.<sup>63</sup> Education has remained one of the most important vehicles for promoting culture and identity in Quebec, which in particular, feels the need to protect its distinct identity from the rest of Canada. Social policies such as education have been seen “as an important lever of control and development for the Quebec state [since] the Quiet Revolution in the 1960s.”<sup>64</sup> A shift in the 1970s to providing bilingual education across Canada in recognition of the idea that Canada has two founding cultures, English and French, shows how education has been used for the purpose of promoting culture in Canada.<sup>65</sup>

Education has also been a source of power and legitimacy for provincial governments.<sup>66</sup> Given that it is a guaranteed human right, accepted as compulsory and universal in Canada, education has become one of the most important services provided by provincial governments. As such, individuals as well as the international community confer legitimacy on provincial governments with the provision of this service. The OECD has recognized Canada as the only member state without a federal education ministry, which makes the provincial education ministries extremely powerful given that there is no federal oversight in this area.<sup>67</sup> Because education provides a considerable source of provincial responsibility, power and legitimacy, the liberalization of education services trade through an external conditioning framework such as the GATS will not likely be supported by all provincial governments to the same extent.

The potential for discord, both inter-provincially and inter-governmentally, appears to be somewhat mitigated by the commitment structure of the GATS. The first-tier of the commitment structure, which is top down in nature, allows the federal government to opt-in to certain areas without making specific commitments. The second-tier of the commitment structure, which is bottom-up, allows the provinces to specify to what extent NT and market access will be applied to the committed area.<sup>68</sup> This two-tiered structure is important: given that education is provincial jurisdiction, commitments could not be made in good faith by the federal government without specific authorization from the provinces. Furthermore, it allows each province to make separate commitments without requiring the federal government obtain the same concessions from each province.

In response to this two-tier commitment structure, some might argue that much of the pressure to push the agenda on liberalizing trade in education services is removed from the federal government. This would be because the federal government could make a top-down commitment to opt-in on education but argue that they could not make any further commitments

in this sector given that education is solely a provincial responsibility. While this is *de jure* true, international actors as of late have shown little patience for jurisdictional justifications. In the 1987 GATT dispute between Canada and the European Community over liquor and wine distribution and marketing, the federal government attempted to argue that the division of powers prevented it from implementing GATT provisions with respect to provincial liquor board practices. The federal government lost this case as the GATT dispute settlement panel stated that Canada was obligated to take “‘all reasonable measures’ to ensure that regional and local governments adhered to the Agreement.”<sup>69</sup> Further dissatisfaction felt by other international governments over Canada’s use of jurisdictional justifications for failure to implement commitments can be seen in the Canada-US Free Trade Agreement (CUFTA) negotiations, where the US insisted on a provision that would prohibit discriminatory pricing policies of provincial liquor boards.<sup>70</sup> The federal government was forced to explicitly include areas of provincial responsibility. Both of these scenarios illustrate that international actors have been unwilling to accept jurisdictional justifications for failure to comply, and show that a two-tier commitment structure does not absolve the federal government from pressure.

Furthermore, international trading partners are also less likely to be satisfied with varied, partial commitments across ten Canadian provinces. Differential commitments between provinces make it difficult for international actors to plan marketing strategies and anticipate the barriers they face upon entry into each market.<sup>71</sup> This is a key component of the Australian Delegation’s proposal cited above, which refers to the need for greater transparency of government regulatory, policy and funding frameworks to aid exporters.<sup>72</sup> Thus, while the two-tier commitment structure of the GATS might appear to help minimize tensions in Canadian federal-provincial relations, it might do little to placate international trading partners and may enhance the pressures felt by the federal government for commitments in this area. As such, the two-tier commitment structure could lead to greater inter-governmental tensions within Canada. This potential is exacerbated by the fact that there are instruments at the federal government’s disposal for achieving provincial compliance with liberalization initiatives should the federal government desire it.

The federal government has two mechanisms by which to achieve compliance from the provincial governments. The first and most significant is through transfer payments. Although the provinces have sole jurisdiction over education, they do not have significant taxation

power.<sup>73</sup> As such, the federal government gives substantial transfers to the provinces for social services like education. In 1999, federal grants to the provinces amounted to 15 percent of provincial revenues.<sup>74</sup> This is a significant source of revenue for the provinces, particularly poorer ones. Federal transfer payments, however, are transferred on a voluntary basis and are not a legal requirement.<sup>75</sup> Thus, the federal government possesses the ability to withhold funding from provinces that refuse to follow the federal government's wishes.<sup>76</sup> Withholding transfer payments would likely be to handicap provincial abilities to provide social programs, as a result likely reducing the legitimacy of provincial governments.

While the likelihood that the federal government would withhold transfer payments from the provinces over this issue is unknown,<sup>77</sup> the ability to threaten to withhold transfer payments gives the federal government a significant amount of power. Furthermore, although withholding transfer payments would be an extreme measure taken by the federal government that would result in significant federal-provincial discord, its relevance should not be dismissed. During the CUFTA negotiations, which included the aforementioned prohibition of discriminatory pricing policies by provincial liquor boards insisted upon by the US, Prime Minister Mulroney assured the Americans that implementation could be secured with or without the approval of the provinces, despite the fact that implementation in areas of provincial jurisdiction constitutionally belong to the provinces.<sup>78</sup> The Ontario government, "although strongly opposed to the agreement, [also] subsequently conceded that this was the case."<sup>79</sup> While the Prime Minister did not specify that transfer payments would be the mechanism by which this implementation would be secured, this mechanism remains the strongest and most acute at the federal government's disposal.

Attempting to co-opt the provinces through an internal trade agreement harmonizing standards across Canada would be another instrument the federal government could attempt to use to secure its policy preferences. It has been argued that the Agreement on Internal Trade struck in the early 1990s was an instrument used by the federal government to achieve harmonization around and secure compliance with the North American Free Trade Agreement.<sup>80</sup> The momentum to further liberalize trade within Canada has been kept alive recently by several regional inter-provincial trade, investment and mobility agreements, which the federal government has supported and expressed interest in expanding.<sup>81</sup> These agreements lay the groundwork for liberalizing trade in services such as education. Provinces opposed to



liberalization might still support such an agreement, however, particularly if the federal government opts-in to education at the GATS, as it could establish a legally binding ‘bottom line’ for education liberalization and stem a race to the bottom to attract investment.

A ‘race to the bottom,’ in the context of the liberalization of education services trade refers to the possibility of certain provinces offering more generous liberalization gains in order to attract foreign investment. This may occur at the expense of other provinces that also desire to attract foreign educational service providers, but want to retain a degree of control over the provision of education by limiting NT and market access commitments. Through the two-tier negotiation and commitment structure of the GATS, provinces could be encouraged to undercut one another, as the electorate and undoubtedly opposition political parties would criticize the government for lost revenue potential given that gains by neighbouring provinces that had liberalized would likely be evident. It would likely be easier for foreign providers to move to another province than another country where better conditions for the provision of service might exist. This exacerbates the pressure felt by provincial governments, as it is easier for transnational companies “to play 10 provinces...against one another than it is to ‘whip-saw’ large national governments.”<sup>82</sup>

Competition with other provinces to attract investment and profit from foreign providers could undermine efforts to protect education as a public good. Foreign education providers can profit by helping to attract international students. Grieshaber-Otto and Sanger state that in B.C., international students at elementary and secondary school levels currently pay \$11,000 per year, which more than covers the costs of hosting the international student and contributes revenue to the school district.<sup>83</sup> 14 school boards in British Columbia have established companies that operate overseas providing education services for a profit. Recently, however, the connection between these companies and the school boards that have helped subsidize their start-up costs has come under scrutiny.<sup>84</sup> In order to avoid the conflict of interest that exists in having publicly funded school boards controlling and subsidizing private education companies, foreign providers which would help school boards and governments profit off of the provision of education services to foreign students might be desirable. In order to attract such foreign providers, provincial governments might be inclined to limit taxes; however this would reduce “provincial governments’ capacity to redistribute through progressive taxation and universal social programs,”<sup>85</sup> which would have negative effects for public education.

Thus while the two-tier negotiation and commitment structure might appear to improve intergovernmental relations by recognizing provincial autonomy in the provision of education, this structure could actually encourage competition and fragmentation in policy. This could lead to increased international pressures on the federal government and incentives for provinces to undercut one another, ultimately undermining the attitude that education is a human right and can only be protected as such if it remains a public good.

### Conclusion

As a country that considers itself to be a respectable member of the international community, Canada has a responsibility to uphold education as a fundamental human right, compulsory and accessible at the primary and secondary level. Maintaining free education services at the primary and secondary level in Canada and limiting the provision of private education by foreign service providers permits the government to continue to supply education as a public good, non-excludable and non-rival. The GATS threatens the ability of governments to retain education as a public good. Through the principles of MFN, domestic regulation, NT, and market access, governments' ability to make public policy through treasure and authority-based instruments would be constrained; it is uncertain how well the governmental authority exclusion would protect public education or whether public education in Canada would even be covered.

While the scope of this paper might seem odd given that Canada has not yet made any commitments to liberalize education, there is evidence that education at the primary and secondary level in Canada is already becoming commodified. This is occurring through international student programs and foreign-operating companies created by school boards seeking to raise funds to help sustain public education. The commodification that is occurring as a result of such endeavours will enhance the ease with which GATS provisions are accepted in education at the primary and secondary level, as the requisite perception shift from education as achieving a collective societal good towards education as a profitable commodity has already begun to occur. This indicates that for Canada, the downward progression from committing to liberalize higher levels of education to lower levels of education might occur much more quickly, making an analysis of the effects of such liberalization relevant and timely.

This is especially so considering the international pressure that Canada faces to begin the liberalization of education services trade, as indicated by the proposals from countries such as

Australia and the United States. Canada's trade dependency makes the country highly prone to issue linkage from valuable trading partners. Furthermore, the desire of the federal government to promote exports of Canadian educational products abroad is bound to strain Canada's ability to resist the liberalization of education services indefinitely. Pressure on the federal government is not likely to rescind despite the two-tiered structure of commitments that exists under the GATS. While the federal government can argue that education is beyond its jurisdiction, there has been minimal empathy in the international trade regime towards the constraints of national constitutional structures. Additionally, there are mechanisms at the federal government's disposal for achieving provincial compliance. While the two-tier commitment structure might *de jure* give provinces more autonomy, it *de facto* increases the likelihood of coercion by the federal government to achieve national consensus, and competition between provinces to attract foreign investment and business. Overall, for education services to be incorporated into the global trade regime under the GATS, a shift in perception of education from a public good to a commodity must occur; this shift is only encouraged and reinforced by the structure and dynamics of Canadian federalism.

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## Notes

<sup>1</sup> J. Anthony VanDuzer, "Navigating between the Poles: Unpacking the Debate on the Implications of Development of GATS Obligations relating to Health and Education Services," in Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance, eds. Ernst-Ulrich Petersmann et al. (Oxford: Oxford University Press, 2005), 167-8.

<sup>2</sup> Jim Grieshaber-Otto and Matthew Sanger, Perilous Lessons: The Impact of the WTO Services Agreement (GATS) on Canada's Public Education System, (Ottawa: Canadian Centre for Policy Alternatives, 2002), 36-7.

<sup>3</sup> F. Joseph Francois and Ian Wooton, "Imperfect Competition and Trade Liberalization under the GATS," in Services in the International Economy, eds. Robert M. Stern (Ann Arbor: The University of Michigan Press, 2001), 141.

<sup>4</sup> Scott Sinclair and Jim Grieshaber-Otto as quoted in Grieshaber-Otto and Sanger, Perilous Lessons, 6-7.

<sup>5</sup> This value was determined from services trade flows in the 1980s. These figures are the most recent cited in several books, but have likely substantially increased. Bernard M. Hoekman and Michel M. Kostecki, The Political Economy of the World Trading System: The WTO and Beyond, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2001), 237; Alice Landau, International Trading System, (New York: Routledge, 2005), 46.

<sup>6</sup> Hoekman and Kostecki, The Political Economy of the World Trading System, 239.

<sup>7</sup> Ibid., 239.

<sup>8</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 7.

<sup>9</sup> Part II, Article II.1, "The General Agreement on Trade in Services," The World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf)> (7 March 2006), 286.

<sup>10</sup> Alice Landau, The International Trading System, 54; Part II, Article II.3, "The General Agreement on Trade in Services," 286.

<sup>11</sup> Part III, Article XVII.1, "The General Agreement on Trade in Services," 298.

<sup>12</sup> Part III, Article XVI.2(a)-(f), "The General Agreement on Trade in Services," 297.

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- <sup>13</sup> Part II, Article VI.1, “The General Agreement on Trade in Services,” 289.
- <sup>14</sup> Part II, Article VI.4, “The General Agreement on Trade in Services,” 290.
- <sup>15</sup> Part I, Article I.3(b), “The General Agreement on Trade in Services,” 286.
- <sup>16</sup> Part I, Article I.3(c), “The General Agreement on Trade in Services,” 286.
- <sup>17</sup> Part IV, Article XX.1(a)-(c), “The General Agreement on Trade in Services,” 299.
- <sup>18</sup> Although no commitments have been made by the Canadian government on education as of yet, this is the convention employed in other areas of GATS where commitments have been made.
- <sup>19</sup> Part IV, Article XIX.1, “The General Agreement on Trade in Services,” 298.
- <sup>20</sup> Ibid., 298.
- <sup>21</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 42.
- <sup>22</sup> Marcia Rioux and Ezra Zubrow, “Social Disability and the Public Good,” in The Market or the Public Domain: Global Governance and the Assymetry of Power, eds. Daniel Drache (London: Routledge, 2001), 150.
- <sup>23</sup> Rioux and Zubrow, “Social Disability and the Public Good,” 152-3, postulate that social well-being is itself a public good in that social well-being encompasses and desires to maximize goals of equity, shared communal benefits, and indivisibility which are inherently at the core of a notion of public goods. While this article supports the argument being made in this paper, this paper treats social well-being and public goods as distinct but complementary, with social well-being enhanced by the provision of public goods, as opposed to synonymous with it, which is likely less contentious.
- <sup>24</sup> Theodore H. Cohn, Global Political Economy: Theory and Practice, 2<sup>nd</sup> edition (New York: Longman, 2003), 79.
- <sup>25</sup> Ibid., 97.
- <sup>26</sup> Bisnath, “The WTO, GATS, and TPRM,” 164.
- <sup>27</sup> Ibid., 164.
- <sup>28</sup> Article 26.1, “Universal Declaration of Human Rights,” United Nations Department of Public Information <<http://www.unhchr.ch/udhr/lang/eng.htm>> (8 March 2006).
- <sup>29</sup> Part III, Article 13.2(b), “International Covenant on Economic Social and Cultural Rights (ICESCR),” United Nations Office of the High Commissioner for Human Rights <[http://www.unhcr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhcr.ch/html/menu3/b/a_ceschr.htm)> (8 March 2006).
- <sup>30</sup> United Nations Committee on Economic, Social and Cultural Rights as presented in Greishaber-Otto and Sanger, Perilous Lessons, 16.
- <sup>31</sup> VanDuzer, Navigating Between the Poles, 171.
- <sup>32</sup> Michael Howlett and M. Ramesh, Studying Public Policy: Policy Cycles and Policy Subsystems, 2<sup>nd</sup> edition (Oxford: Oxford University Press, 2003), 103-6.
- <sup>33</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 40.
- <sup>34</sup> This assumes that most foreign providers which might enter the market if educational services were liberalized would be for profit, although it is acknowledged that some private provision is not-for-profit.
- <sup>35</sup> Howlett and Ramesh, Studying Public Policy, 103-6.
- <sup>36</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 40.
- <sup>37</sup> Neo-liberal governments could subvert this criticism by implementing a voucher system, whereby parents would be given funding for their children’s education with the freedom to choose where it would be spent. This would allow the market to naturally limit the number of producers. However, this would be equally detrimental to public education, as public education would be treated on an equal basis with private education. Inequalities would result where the market access principle was reinforced by the NT principle, which would create a *de facto* subsidy for private education.
- <sup>38</sup> Bisnath, “The WTO, GATS, and TPRM,” 163.
- <sup>39</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 43.
- <sup>40</sup> Ibid., 28-9.
- <sup>41</sup> Ibid., 26, 28.
- <sup>42</sup> Part I, Article I.3(c), “The General Agreement on Trade in Services,” 286.
- <sup>43</sup> VanDuzer, “Navigating between the Poles,” 170.
- <sup>44</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 47.
- <sup>45</sup> Ibid., 20-1.
- <sup>46</sup> Delegation of Australia, “Negotiating Proposal for Education Services,” Council for Trade in Services (1 October 2001) <<http://www.docsonline.wto.org>> (8 March 2006), 4.
- <sup>47</sup> Australia, “Schedule of Specific Commitments,” General Agreement on Trade in Services (15 April 1994) <<http://docsonline.wto.org>> (30 March 2006).

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- <sup>48</sup> Ibid.
- <sup>49</sup> Delegation of Australia, "Negotiating Proposal for Education Services," Council for Trade in Services (1 October 2001) <<http://www.docsonline.wto.org>> (8 March 2006), 3.
- <sup>50</sup> Ibid., 4.
- <sup>51</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 10.
- <sup>52</sup> Delegation of the United States, "Higher (Tertiary) Education, Adult Education, and Training," Council for Trade in Services (18 December 2000) <<http://www.docsonline.wto.org>> (8 March 2006), 3.
- <sup>53</sup> Ibid., 4.
- <sup>54</sup> Ian Robinson, "Neo-Liberal Trade Policy and Canadian Federalism Revisited," in New Trends in Canadian Federalism, 2<sup>nd</sup> edition, eds. Francois Rocher and Miriam Smith (Toronto: Broadview Press, 2003), 207.
- <sup>55</sup> Jim Grieshaber-Otto, Phone Interview, 17 February 2006.
- <sup>56</sup> Although our trade dependence might have caused long-term structural problems with the development of our economy, in the short-term we gain significant foreign exchange and employment from being able to export without restraint to other countries.
- <sup>57</sup> "Education, Learning, Training," Department of Foreign Affairs and International Trade, (19 February 2005) <<http://dfait-maeci.gc.ca/ics%2Dcki/menu-en.asp>> (8 March 2006).
- <sup>58</sup> "Canadian Academic Institutions & Businesses Exporting Canadian Products," Department of Foreign Affairs and International Trade (19 February 2005) <[http://dfait-maeci.gc.ca/ics%2Dcki/bus\\_menu-en.asp](http://dfait-maeci.gc.ca/ics%2Dcki/bus_menu-en.asp)> (8 March 2006).
- <sup>59</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 125.
- <sup>60</sup> Garth Stevenson, Unfulfilled Union: Canadian Federalism and National Unity, 4<sup>th</sup> edition, (Montreal: McGill-Queen's University Press, 2004), 269; Robinson, "Neo-Liberal Trade Policy and Canadian Federalism Revisited," 207.
- <sup>61</sup> Government of Canada, "Constitution Acts 1867 to 1982," Department of Justice Canada <[http://laws.justice.gc.ca/en/const/c1867\\_e.html#provincial](http://laws.justice.gc.ca/en/const/c1867_e.html#provincial)> (9 March 2006).
- <sup>62</sup> Donald V. Smiley, Canada in Question: Federalism in the Eighties, 3rd edition (Toronto: McGraw-Hill Ryerson Limited, 1980), 57.
- <sup>63</sup> VanDuzer, "Navigating Between the Poles," 172.
- <sup>64</sup> Antonia Maioni and Miriam Smith, "Health Care and Canadian Federalism," in New Trends in Canadian Federalism, 2<sup>nd</sup> edition, eds. Francois Rocher and Miriam Smith (Toronto: Broadview Press, 2003), 298.
- <sup>65</sup> Matthew Hayday, "Confusing and Conflicting Agendas: Federalism, Official Languages and the Development of the Bilingualism in Education Program in Ontario, 1970-1983," Journal of Canadian Studies, Vol. 36, No. 1 (Spring 2001), 51.
- <sup>66</sup> Larry Kuehn, "Education: Mosaic vs. Melting Pot," Social Policy, Vol. 23, Is. 1 (1992), 65.
- <sup>67</sup> Organization for Economic Cooperation and Development, "Review of National Policies for Education: Canada," in Canadian Federalism: Myth or Reality, eds. J. Peter Meekison (Toronto: Methuen Publications, 1976); Grieshaber-Otto and Sanger, Perilous Lessons, 18.
- <sup>68</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 8.
- <sup>69</sup> Grace Skogstad, "International Trade Policy and Canadian Federalism: A Constructive Tension?" in Canadian Federalism: Performance, Effectiveness and Legitimacy, eds. Herman Bakvis and Grace Skogstad (Don Mills, Ont: Oxford University Press, 2002), 162.
- <sup>70</sup> Stevenson, Unfulfilled Union, 272.
- <sup>71</sup> Bisnath, "The WTO, GATS, and TPRM," 156-7.
- <sup>72</sup> The Delegation of Australia Proposal, "Negotiating Proposal for Education Services," 3.
- <sup>73</sup> Gerard W. Boychuk, "Social Assistance and Canadian Federalism," in New Trends in Canadian Federalism, 2<sup>nd</sup> edition, eds. Francois Rocher and Miriam Smith (Toronto: Broadview Press, 2003), 270.
- <sup>74</sup> Robinson, "Neo-Liberal Trade Policy and Canadian Federalism Revisited," 212.
- <sup>75</sup> The Constitution Act of 1982 only specifies under Part III, Section 36 that Equalization and Regional Disparities must be addressed by the federal Parliament.
- <sup>76</sup> Robinson, "Neo-Liberal Trade Policy and Canadian Federalism Revisited," 212.
- <sup>77</sup> The federal government has in the past withheld transfer payments from British Columbia over discriminatory welfare practices, Alberta over health care user fees and New Brunswick over the provision of abortion services.
- <sup>78</sup> Stevenson, Unfulfilled Union, 272.
- <sup>79</sup> Ibid., 272.

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<sup>80</sup> Grieshaber-Otto, Phone Interview, 17 February 2006.

<sup>81</sup> Council of the Federation, "Premier's Strengthen Trade," 10 August 2007 <[http://www.councilofthefederation.ca/pdfs/Competitiveness\\_Trade\\_Aug8\\_EN.pdf](http://www.councilofthefederation.ca/pdfs/Competitiveness_Trade_Aug8_EN.pdf)>, (11 September 2007).

<sup>82</sup> Robinson, "Neo-Liberal Trade Policy and Canadian Federalism Revisited," 208.

<sup>83</sup> Grieshaber-Otto and Sanger, Perilous Lessons, 53.

<sup>84</sup> Janet Steffenhagen, "Minister Questions New West School Board: Business 'Investment' Worries Shirley Bond," The Vancouver Sun, (20 March 2006), B1, B4.

<sup>85</sup> Robinson, "Neo-Liberal Trade Policy and Canadian Federalism Revisited," 209.